



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Gayston Corporation--Request for Reconsideration
File: B-223090.2
Date: July 25, 1986

DIGEST

Dismissal of protest of contracting agency's affirmative responsibility determination is affirmed where the protester who alleges bad faith on the part of agency officials has not presented virtually irrefutable proof of bad faith. Delinquent deliveries under a prior contract do not alone require a finding of nonresponsibility by the procuring agency.

DECISION

Gayston Corporation (Gayston) requests reconsideration of our dismissal of its protest concerning the award of a contract to Master Molding, Inc. (Master Molding), for 67,629,097 tape stiffener assemblies under invitation for bids (IFB) DAAA09-86-B-0005 issued January 9, 1986, by the Army Armament, Munitions and Chemical Command, Rock Island, Illinois. In its protest, Gayston contended that the determination by the agency's procurement officials that Master Molding is a responsible bidder is improper because of that firm's alleged unsatisfactory performance under prior contracts for the acquisition of tape and stiffener assemblies. The protester states that Master Molding has been delinquent in meeting the delivery requirements under the prior contracts.

Our Office dismissed Gayston's protest on the basis that our Office does not review affirmative determinations of responsibility absent a showing that contracting agency personnel acted fraudulently or in bad faith or that definitive responsibility criteria contained in the solicitation were not met. 4 C.F.R. § 21.3(f)(5) (1986). Upon receipt of our dismissal, Gayston asked that we reconsider it, stating that it contends "that contracting agency personnel did indeed act in bad faith."

In response to Gayston's request for reconsideration, the agency advises that the contracting officer's determination to award to Master Molding was based on a favorable preaward survey which was conducted by the Defense Contract Administration Services, New York. The preaward survey team considered the various factors related to the matter of Master

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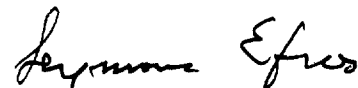
Molding's responsibility, including its technical and production capabilities and its ability to meet the required delivery schedule, and found all to be satisfactory. The agency has withheld the preaward survey from the protester, but has provided a copy of it to our Office. Our review of the preaward survey report confirms that the survey expressed the view "that Master Molding will produce the tape stiffener assembly within the time constraints of [the] solicitation."

In its comments, Gayston points out that the agency report does not specifically address its allegations concerning Master Molding's unsatisfactory performance under prior contracts and, therefore, Gayston urges that its protest be sustained.

A protester bears a heavy burden of proof when alleging bad faith on the part of agency officials. To make a showing of fraud or bad faith on the part of agency officials, the protester must demonstrate by virtually irrefutable proof, not mere inference or supposition, that these officials had a specific and malicious intent to injure the protester. NJCT Corp., 64 Comp. Gen. 883 (1985), 85-2 C.P.D. ¶ 342. Gayston has not met this heavy burden of proof by merely citing alleged instances of prior unsatisfactory performance by Master Molding under recent contracts.

Contracting officers have broad discretion as to the degree of reliance to be placed on preaward surveys. Newport Offshore Ltd., B-219031, B-219031.2, June 13, 1985, 85-1 C.P.D. ¶ 683. Furthermore, an affirmative determination of responsibility in the light of unfavorable information on the prior performance history of a bidder, in some instances, may reflect on a contracting officer's business judgment, but is not itself evidence of bad faith per se. See REDM Corp., B-211197, Apr. 21, 1983, 83-1 C.P.D. ¶ 428. Recent unsatisfactory performance does not require a determination that a bidder is nonresponsible; in each case, the contracting officer must make a business judgment as to whether the prior delinquent performance indicates such problem will also be encountered during performance of the contract to be awarded. Fujinon, Inc., B-221815, Jan. 30, 1986, 86-1 C.P.D. ¶ 112. See also Jay Fran Corp., B-217145, Jan. 2, 1985, 85-1 C.P.D. ¶ 8.

Accordingly, the prior dismissal of Gayston's protest is affirmed.

for 
Harry R. Van Cleve
General Counsel